(7)

No. 89-1363

Supreme Court, U.S.
FILED
AUG 29 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES OF AMERICA, PETITIONER

v.

DARLINA K. FRANCE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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1. a. Respondent's proposed "futility" exception has no support in the text of Fed. R. Crim. P. 51 and 52(b). Rule 51 requires a contemporaneous objection except where "a party has no opportunity to object." Rule 52(b) permits an appellate court to grant relief to a party who did not comply with Rule 51 if the alleged error is "plain," but Rule 52(b) contains no exception for cases of alleged futility.[1]

This Court has made clear that the Rules of Criminal Procedure are "in every pertinent respect * * * as binding as any statute duly enacted by Congress." *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 255 (1988). The Rules are to be enforced according to their terms,

[1] Although Rule 52(b) is phrased in the disjunctive, the phrase "affecting substantial rights" applies to both "errors" and "defects," and the Rule "applies only to errors affecting substantial rights." *United States* v. *Young*, 470 U.S. 1, 15 n.12 (1985). See also *United States* v. *Frady*, 456 U.S. 152, 163 & n.14 (1982).

not treated simply as general, hortatory guides to the conduct of litigation. See *Cooter & Gell* v. *Hartmax Corp*,. 110 S. Ct. 2447, 2453 (1990); *Pavelic & Leflore* v. *Marvel Entertainment Group*, 110 S. Ct. 456, 458 (1989); *Schiavone* v. *Fortune*, 477 U.S. 21, 30 (1986). Because Rules 51 and 52(b) do not recognize a "futility" exception to the contemporaneous objection rule, there is no justification for creating such an exception, however reasonable such an innovation might seem to respondent. See *Pavelic & Leflore*, 110 S. Ct. at 460 ("Our task is to apply the text, not to improve upon it.").

Apart from abolishing the practice of noting "exceptions," Rules 51 and 52(b) were intended to adopt existing law. See Fed. R. Crim. P. 51 (contemporaneous objection required "for all purposes for which an exception has heretofore been necessary"); Fed. R. Crim. P. 52, Notes of Advisory Committee on Rules, 18 U.S.C. App. at 833 (1988) (Rule 52(b) "is a restatement of existing law"). The law in 1946, when Rules 51 and 52 were adopted, did not recognize a "futility" exception. Although this Court in several pre-1946 cases had excused the defendant's failure to note an exception to particular rulings, those cases all involved instances of "plain error,"[2] and the Court's authority to "notice a plain error not assigned or specified" was codified in this Court's Rules. Sup. Ct. R. 27.6, 306 U.S. 708 (1939) (current version at Sup. Ct. R. 24.1(a) (1990)). None of the "plain error" cases suggested, much less held, that

[2] See *Wiborg* v. *United States*, 163 U.S. 632, 658 (1896) (claim that there was no evidence to support the verdict); *Clyatt* v. *United States*, 197 U.S. 207, 221-222 (1905) (same); *Weems* v. *United States*, 217 U.S. 349, 362 (1910) (claim that a sentence constituted cruel and unusual punishment); *Brasfield* v. *United States*, 272 U.S. 448, 450 (1926) (claim that the trial judge improperly asked the jury during deliberations for its numerical division); *Screws* v. *United States*, 325 U.S. 91, 107 (1945) (plurality opinion) (claim that the trial court omitted an essential element of the offense from the jury instructions). See also *Crawford* v. *United States*, 212 U.S. 183, 194 (1909).

a party's default should be excused when an alleged error was not "plain" (because it did not result in a miscarriage of justice), but the party nonetheless believed it would have been futile to take an exception.

Respondent relies on a series of decisions chiefly by the Second and Ninth Circuits that have excused defaults on futility grounds. Like respondent's argument in this Court, however, none of those cases made any attempt to reconcile the "futility exception" with Rules 51 and 52(b). Moreover, a number of the cases cited by respondent are habeas corpus cases in which the error was regarded as fundamental, and thus would likely have been treated as "plain error," not requiring objection, if the issue had arisen on direct appeal.[3] The habeas corpus cases provide no support for respondent's position in any event, because this Court in *Engle* v. *Isaac*, 456 U.S. 107 (1982), squarely held that the apparent "futility" of a constitutional claim is not a sufficient justification for a defendant's failure to raise that claim in the state court system.[4]

[3] See, *e.g.*, *Callanan* v. *United States*, 881 F.2d 229, 231 (6th Cir. 1989). cert. denied, 110 S. Ct. 1816 (1990); *Ingber* v. *Enzor*, 841 F.2d 450, 454-455 (2d Cir. 1988); *Martone* v. *United States*, 435 F.2d 609, 610-611 (1st Cir. 1970). Two of the cited cases excused a defendant's failure to object in part on the ground that the defendant did not make a knowing and intelligent waiver of his claim under the standard of *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), and *Fay* v. *Noia*, 372 U.S. 391 (1963). See *Hernandez* v. *Beto*, 443 F.2d 634, 637 (5th Cir.), cert. denied, 404 U.S. 897 (1971); *United States ex rel. O'Connor* v. *New Jersey*, 405 F.2d 632, 634 n.2 (3d Cir.), cert. denied, 395 U.S. 923 (1969). Those cases did not survive *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), and *Engle* v. *Isaac*, 456 U.S. 107 (1982).

[4] The decision in *Engle* undermines the Fifth Circuit's partial reliance on the futility doctrine in *Smith* v. *Estelle*, 602 F.2d 694, 708 n.19 (1979), aff'd, 451 U.S. 454 (1981). It is unnecessary to debate whether this Court's remark that it adopted "the reasons stated by the Court of Appeals," 451 U.S. at 468 n.12, can be read as an implicit acceptance of that rationale, because the following year the Court in *Engle* conclusively disposed of the issue by rejecting the "futility" doctrine in habeas corpus cases.

Contrary to respondent's claim, this Court has not recognized a futility exception. *Osborne* v. *Ohio*, 110 S. Ct. 1691 (1990), did not excuse a defendant's failure to raise a claim at trial. It held only that the defendant did not forfeit his claim by failing to ask for a jury instruction on an issue that he had already unsuccessfully raised in a pretrial motion to dismiss the charges. *Id.* at 1703-1705. In *Douglas* v. *Alabama*, 380 U.S. 415 (1965), the defendant raised his Confrontation Clause claim six times. Respondent refers to the statement that "[n]o legitimate state interest would have been served by requiring repetition of a patently futile objection," 380 U.S. at 422, but that quotation is wrenched out of context. Read in context, *Douglas* held only that additional objections beyond the six already raised were unnecessary. *Id.* at 422-423.

Grosso v. *United States*, 390 U.S. 62 (1968), and *Leary* v. *United States*, 395 U.S. 6 (1969), like *Reed* v. *Ross*, 468 U.S. 1 (1984), adopted a novelty, not a futility, exception.[5] Moreover, language in the opinions referring to the defendants' "waiver" of their claims, *Grosso*, 390 U.S. at 71; *Leary*, 395 U.S. at 28, suggests that this Court believed that a defendant could forfeit a claim only by making a knowing and intelligent waiver under *Johnson* v. *Zerbst*, 304 U.S. 458 (1938). That is no longer the law, however, as we explained in our opening brief (at 24 n.13).

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[5] Respondent suggests that there is no principled distinction between a "novelty" exception and a "futility" exception to the contemporaneous exception rule. It is a sufficient answer to point out that in *Engle* v. *Isaac*, *supra*, this Court drew a clear distinction between the two: It held that "futility" does not establish cause for a failure to object, while expressly declining to decide whether the novelty of a constitutional claim can ever establish such cause. Compare 456 U.S. at 130 ("the futility of presenting an objection to the state courts cannot alone constitute cause for failure to object at trial") with *id.* at 131 ("We need not decide whether the novelty of a constitutional claim ever establishes cause for a failure to object.").

b. Even if the Court were to create a "futility" exception, the exception should apply only where binding authority *required* the district court to deny the relief desired by the defendant; it should not apply where the circuit court authority merely *permitted* the district court to deny the requested relief. As we explained in our opening brief (at 24-26), the Ninth Circuit had previously held only that a magistrate *could* conduct voir dire, not that a magistrate *must* do so; district judges in Hawaii did not invariably assign jury selection to magistrates; and there was reason to believe that another court might disagree with the Ninth Circuit, as this Court later did in *Gomez*. Under these circumstances, respondent's failure to comply with Rule 51 should not be excused on grounds of futility, even if true futility could justify the failure to object in an appropriate case.

Contrary to respondent's contention (Br. 22-26), there is nothing unreasonable about requiring a defendant to object even when a particular custom or practice is settled in a particular district, as she submits was the case with magistrate-conducted voir dire in Hawaii. Even if an attorney reasonably believes that it is futile to raise a particular claim, it is still important to insist on a contemporaneous objection because it promotes candor, it gives the district judge an opportunity to reconsider its position on the matter, it avoids time-consuming difficulties in administering the contemporaneous objection rule, and it gives some indication to the reviewing court that the issue is one that mattered to the objecting party.

For tactical reasons, a defendant may prefer to have a magistrate, rather than a district judge, conduct voir dire. A particular magistrate may permit defense counsel to address or question the venire; the magistrate may conduct a more probing inquiry than a district judge; and the magistrate may be more willing than a district judge to grant for-cause challenges. When that is true, excusing a defendant's noncompliance with a contemporaneous objection rule allows the defendant to eat his

cake and have it too. The defendant enjoys the benefits of his preferred choice, while retaining a claim for appeal. See *Wainwright* v. *Sykes*, 433 U.S. 72, 89 (1977); *Estelle* v. *Williams*, 425 U.S. 501, 508 (1976); *id.* at 515 (Powell, J., concurring).[6]

Respondent has overestimated the burden on the legal system from enforcing a contemporaneous objection rule even when an objection would be futile. If a claim is, in fact, foreclosed by "a solid wall of circuit court authority," *United States* v. *Scott*, 425 F.2d 55, 57 (9th Cir. 1970), it is a very simple matter for counsel to preserve his claim while candidly acknowledging that governing circuit precedent is to the contrary.

To require objection in the case of a ruling that the attorney believes has unfairly prejudiced his client does not, of course, mean that counsel should or must raise claims that he is convinced are frivolous. In the case of a contention that counsel knows neither the court of appeals nor this Court is likely to accept, it is entirely reasonable for counsel to forgo raising it, something that defense lawyers do as a matter of course with regard to dozens of rulings in every trial. Yet respondent seems to acknowledge that claims that have not been foreclosed by law in the defendant's own circuit are forfeited if not raised at trial, even if the attorney declined to raise the issue because he regarded it as hopeless. It would be quite odd to create a special exception to the contemporaneous objection rule for the small category of cases in which the issue had been resolved by a prior decision from the defendant's circuit, but not for cases in which the attorney abandoned the issue for other reasons, such as his lack of confidence in the merits of the argument.

[6] To be sure, a defendant who is confident that the court will deny his request to have the court conduct voir dire could lodge such a request without much fear that he would suffer the bad luck of having his request granted. Nonetheless, the risk that the request may be granted will make "sandbagging" less attractive than would be the case if defense counsel is allowed to raise the issue without having stated any objection at all in the district court. That interest is particularly important in a case such as this one, where it is not at all clear which side has benefited from the ruling in question, and where the defendant is therefore seeking reversal on the basis of an error that she may have been perfectly happy to have the district court commit.

c. A futility exception of the sort respondent proposes would inflict significant administrative costs on the criminal justice system by requiring the parties to engage in time-consuming debate about whether the prior decision seemed to foreclose the defendant's claim or simply make it difficult to win.[7] Moreover, the futility exception would raise difficult questions regarding the role of the attorney's state of mind in determining whether a particular claim should have been raised at trial.

The first question is whether the futility doctrine would apply even if the defense lawyer was unaware of the governing court of appeals precedent; that is, whether the failure to raise a point at trial would be excused on grounds of futility even if the lawyer who failed to raise the point had no idea that the claim had been rejected by the court of appeals. If the doctrine applied regardless of the defense counsel's knowledge of the pertinent precedents, the application of the exception would be entirely fortuitous in many cases, since it would excuse a failure to object when that failure was not based on a belief that the legal claim was futile, but was attributable to simple neglect on the part of the attorney. Yet if knowledge of the prior precedent must be established to make the futility exception applicable, it would make administration of the exception unmanageably cumbersome and subject to manipulation.

[7] This inquiry is difficult in part because it is based on a false premise. Litigation over the futility exception typically arises only when, as in this case, it turns out that the objection would not have been futile after all. The task then becomes to determine whether the defendant's miscalculation should be overlooked.

A second question would be whether the exception would apply if the lawyer believed the objection would be futile, but in fact the governing case law did not foreclose the objection. The lawyer may have misread the court of appeals' decision or, to take an extreme case, this Court may have just granted certiorari in the court of appeals case or overturned that case, and the lawyer may not have learned of that fact. To grant relief to a defendant, even in the absence of plain error, where his attorney failed to raise a point because he believed, incorrectly, that it would be futile to do so would open a huge and unmanageable exception to the contemporeneous objection rule. Lawyers would have to testify about their state of mind (with a premium placed on ignorance), and trial courts would have to make findings as to the lawyers' state of mind before an appellate court could determine whether a particular issue could be considered on appeal.

A third question raised by respondent's proposed rule is why there should be any special significance to a binding decision in the court of appeals. Portions of respondent's brief suggest that she declined to raise the issue of magistrate voir dire because the district court had clearly indicated that it would not conduct voir dire despite a defense request. Respondent's brief leaves it unclear whether that would be enough to trigger the "futility" exception, although the policies she cites in support of the exception (not requiring futile acts and not requiring defense counsel to burden or annoy the trial court) would seem to apply to such a case. Yet if the "futility" exception were applied that broadly, it would be applicable in a very large number of cases in which district courts have taken particular legal positions, but in which those legal positions may well turn out to be wrong. Just as there is no magic in a district court's consistent position on a legal question, there is no reason to treat as dispositive for all times a court of appeals' ruling on the issue, no matter how old that ruling may be, no matter how likely it may be to be reconsidered by that court, and no matter how vulnerable it may be to reversal by this Court. Lawyers who are sophisticated enough to be aware of circuit court precedent against them on a particular point also know that a court of appeals may change its mind, may find distinctions between seemingly indistinguishable cases, or may be corrected by this Court.

Respondent's labored effort to demonstrate why an objection would have been futile in this case is a powerful argument against creating a "futility" doctrine, and certainly against applying that doctrine in a case such as this one. Relying on the records of other cases and the prior experience of respondent's trial counsel, respondent seeks to show that even though the prior Ninth Circuit decisions did not in any way bar district courts from conducting jury selection, she should be excused for not objecting, because as a practical matter it was highly unlikely that the district court would agree to conduct jury selection in this case. There is no conceivable justification for a rule that would require such extensive exploration of the past conduct of the district court and the past experience of the defense lawyer, when that entire inquiry could be avoided by a simple, respectful objection of the sort required by Rule 51.[8]

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[8] Respondent's reliance on her counsel's experience in prior cases raises the question whether the "futility" doctrine, as respondent conceives it, would be available if this case had been the first one in which her lawyer had encountered the practice of magistrate conducted voir dire. If the availability of the doctrine turned on the experience and awareness of defense counsel in each case, administering the "futility" doctrine would become hopelessly cumbersome.

For example, Rule 103 of the Federal Rules of Evidence requires an objection to all evidentiary rulings; respondent's "futility" theory would apply whenever (1) the court of appeals had previously treated a particular kind of ruling as discretionary; (2) a particular defense counsel believed a particular district judge would decide the issue against the defendant even if an objection were lodged; and (3) defense counsel had some relevant experience with

Finally, the failure to recognize a "futility" exception does not increase the risk that an innocent person will be convicted. The plain error rule, Fed. R. Crim. P. 52(b), like the doctrine of ineffective assistance of counsel, ensures that a lawyer's failure to assert a claim at trial does not lead to the conviction of an innocent defendant. Because "the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence," *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986), it would be a "miscarriage of justice," *United States* v. *Young*, 470 U.S. 1, 15 (1985) (quoting *United States* v. *Frady*, 456 U.S. 152, 163 & n.14 (1982)), to permit an innocent person to be sent to prison simply because his counsel did not properly raise an objection at trial. Cf. *Murray* v. *Carrier*, 477 U.S. 478, 496 (1986). The plain error rule was adopted to prevent such an occurrence. See *Wiborg* v. *United States*, 163 U.S. 632, 658 (1896). But there is no reason to excuse procedural defaults for errors that do not constitute "plain error" and thus do not entail unacceptable risks of an unjust result in a particular case.

2. Respondent next argues (Br. 27-35) that allowing a magistrate to conduct voir dire is a defect that a defendant *cannot* waive. In part, respondent relies on statements in *Gomez* v. *United States*, 109 S. Ct. 2237 (1989), that a magistrate lacks "jurisdiction" to conduct voir dire. As we explained in our opening brief (at 19-21), however, those statements refer to a magistrate's lack of "authority" to conduct voir dire; they do not answer the question whether that defect is waivable. See *Mahler* v. *Eby*, 264 U.S. 32, 43 (1924) (referring interchangeably to an agency's "jurisdiction" and "authority"). Not every violation of rules regulating the courts' authority to act renders the proceedings a nullity. Cf. *United States* v. *Montalvo-Murillo*, 110 S. Ct. 2072, 2077 (1990). The error that occurred here did not have that effect, since it was not so egregious as to undermine confidence in the ability of the federal criminal justice system accurately and fairly to adjudicate the charges against respondent. See U.S. Br. 20-21.

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the district court to justify his belief. If an appellate court had to inquire into each of those matters before finding that a claim was forfeited, the contemporaneous objection rule would no longer serve its purpose of providing a simple means of focusing the attention of the parties and the reviewing court on those legal issues that the parties regarded as sufficiently important to preserve for appellate review.

a. *Gomez* held that the Magistrate's Act does not authorize a magistrate to preside over jury selection, and that where a defendant objects, magistrate-conducted voir dire requires reversal. But the fact that magistrates are not authorized to conduct voir dire does not mean that the judgments that arise from such trials are void or voidable, regardless of the defendant's consent or failure to object. Suppose a statute or Rule required that the judge who selects the jury must also try the case. In light of that provision, a judge who did not select the jury would be "unauthorized" to try the case; in the language of *Gomez*, he would lack "jurisdiction" to do so. But that certainly does not mean that in spite of the parties' consent or waiver, the judgment in such a case would be void. The statute or Rule would establish a right, and the defendant's consent or his failure to invoke that right would constitute a forfeiture, at least in the absence of plain error. The same analysis applies to respondent's statutory argument in this case.

b. Respondent next goes beyond the statutory analysis of *Gomez* and argues that Article III requires a district judge to preside over every aspect of a trial, including jury selection, and that a defendant in a criminal case may not waive his constitutional right to have an Article III judge preside over jury selection.

If respondent is correct in her view of the restrictions imposed by Article III on the use of magistrates, then far more is at stake than magistrate-conducted voir dire in felony jury trials. The authority of magistrates, on consent, to conduct misdemeanor trials or even to conduct voir dire in misdemeanor cases would be at risk, since

nothing in Article III distinguishes between misdemeanors and felonies. Moreover, while respondent concedes that the right to jury selection by an Article III judge may be waived in civil cases, Resp. Br. 31 n.16, 33, that is a concession of necessity, not of principle, since the Constitution does not create different rules for a court's participation in civil and criminal cases. Magistrates participate in or try a huge number of misdemeanor and civil cases each year,[9] so the consequences of accepting respondent's submission are quite significant. Those consequences need not be borne, however, because respondent's argument is flawed.

i. Article III imposes no rigid bar to the use of magistrates in criminal trials. As this Court has explained, "the Constitution does not require that all persons charged with federal crimes be tried in Art. III courts." *Swain* v. *Pressley*, 430 U.S. 372, 382-383 (1977); see *Palmore* v. *United States*, 411 U.S. 389, 402 (1973) ("Very early in our history, Congress left the enforcement of selected federal criminal laws to state courts and to state court judges who did not enjoy the protections prescribed for federal judges in Art. III."). But even if defendants in all federal criminal cases brought in federal courts enjoy a constitutional right to a trial by an Article III judge, that does not mean that Article III grants them the right to have the judge conduct jury voir dire.

In *United States* v. *Raddatz*, 447 U.S. 667 (1980), this Court rejected an Article III challenge to a magistrate's authority to hear a suppression motion in a criminal case and to make proposed findings and recommendations to the district court concerning the proper disposition of the motion. The Court held that the delegation of suppression hearings to a magistrate "does not violate Art. III

[9] Between July 1, 1988, and June 30, 1989, magistrates tried 1385 non-petty misdemeanor cases and 1005 civil cases. *Annual Report of the Director of the Administrative Office of the United States Courts* 421, 440 (1989).

so long as the ultimate decision is made by the district court." 447 U.S. at 683. The Court emphasized that "the entire process takes place under the district court's total control and jurisdiction." *Id.* at 681. "[T]he magistrate acts subsidiary to and only in aid of the district court." *Ibid.* Justice Blackmun, concurring, emphasized that because the magistrate is subject to the control of an Article III court, "the only conceivable danger of a 'threat' to the 'independence' of the magistrate comes from within, rather than without, the judicial department." *Id.* at 685. Thus, whenever "a controversial matter might be delegated to a magistrate who is susceptible to outside pressures, the district judge—insulated by life tenure and irreducible salary—is waiting in the wings, fully able to correct the errors." *Id.* at 686.

In light of *Raddatz*, a district court's decision to enlist a magistrate's aid in selecting the jury does not violate Article III. Here, as in *Raddatz*, the magistrate's actions were "subsidiary to and only in aid of" the court. 447 U.S. at 681. As in *Raddatz*, the Article III judge was available to review the magistrate's conduct of the voir dire and make the "ultimate decision" whether an impartial jury had been selected. *Id.* at 683. Thus, the district court retained "the essential attributes" of judicial power. *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 81 (1982) (plurality opinion) (quoting *Crowell* v. *Benson*, 285 U.S. 22, 51 (1932)).[10]

ii. Even if the use of a magistrate to conduct jury selection violates a defendant's right to have an Article III judge conduct that procedure, that does not mean the

[10] Article III clearly does not prohibit the familiar practice of delegating to jury commissioners or personnel in the clerk's office the task of selecting members of the venire and excusing them for various causes, such as illness, other commitments, or lack of qualifications. It is difficult to discern a constitutionally based distinction between that screening process and the screening process that occurs in court during voir dire.

right may not be waived or forfeited. As this Court stated in *CFTC* v. *Schor*, 478 U.S. 833, 848-849 (1986), "as a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried."

Permitting a district court to assign jury selection to a magistrate does not entail any of the separation of powers concerns that this Court addressed in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, *supra*, and *CFTC* v. *Schor*, 478 U.S. 833 (1986). A magistrate is an Article III officer who is subject to appointment, removal, and supervision by Article III judges. 28 U.S.C. 631. Moreover, the courts have never been required to assign tasks such as jury selection to magistrates; instead, the courts have been afforded the choice whether to make such assignments. This is therefore not a case of a "congressional attempt[] 'to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating' constitutional courts." *CFTC* v. *Schor*, 478 U.S. at 850 (citation omitted). For that reason, the assignment of jury selection to a magistrate does not amount to a "structural" constitutional violation that transcends the rights of the individual litigant and is not subject to the normal rules governing the forfeiture of constitutional rights.

3. Respondent is clearly wrong in contending (Br. 36-39) that permitting a magistrate to conduct jury selection is a plain error under Rule 52(b). Rule 52(b) applies only to "particularly egregious errors" and excuses a procedural default "solely in those circumstances in which a miscarriage of justice would otherwise result." *Young*, 470 U.S. at 15 (quoting *United States* v. *Frady*, 456 U.S. 152, 163 & n.14 (1982)). The error here does not meet that exacting standard.[11]

[11] In our opening brief, we noted that several courts had held that permitting a magistrate to conduct jury selection does not constitute plain error. Since that time, the Sixth Circuit has joined those courts, holding that *Gomez* does not apply when the defendant fails to object. *United States* v. *Sawyers*, 902 F.2d 1217, 1220 (1990). The First Circuit has held to the contrary, ruling that magistrate-conducted voir dire constitutes plain error that can be raised on appeal even if not objected to below. *United States* v. *Martinez-Torres*, No. 87-2006 (Aug. 20, 1990) (en banc).

Respondent argues that having a magistrate preside at voir dire "may well have devalued if not demeaned the process of jury selection in the jury's eyes" and could have induced members of the venire not to take "seriously their responsibility to answer voir dire questions candidly and fully," because "an Article III judge helps impress on the jurors the gravity of their mission in ways that a magistrate cannot." Br. 36, 39. Respondent does not cite any evidence to support her claim that jurors approach jury selection less seriously when a magistrate conducts voir dire, and that proposition is certainly not intuitively obvious.

It is doubtless true that a judicial officer brings to the voir dire a sense of solemnity that would be absent if it were conducted by the lawyers alone, or perhaps even if the clerk of the court presided. But it is hard to credit the claim that a magistrate will have a materially different effect on the members of the venire than a district judge. Both are judicial officers, and both are likely to perform the task of conducting voir dire with equal seriousness. In the absence of any evidence that a magistrate-conducted voir dire has had an adverse effect on jurors, in this case or in general, it would be wholly unjustified to presume that the use of magistrates to select the jury invariably results in a miscarriage of justice.[12]

[12] Respondent can find only one feature of the magistrate's voir dire to complain about: the magistrate's refusal to ask a question about the jurors' attitudes toward Vietnam veterans. J.A. 48-49; see Resp. Br. 5. Respondent asserts that "an Article III Judge would surely have posed" that question, Resp. Br. 39, but she pro-

Nor is there any reason to suppose that the use of a magistrate is likely to affect the verdict by unfairly skewing the composition of the jury. Even if it is assumed that a magistrate will be less careful or less skilled at jury selection, it is far from clear which side that disability favors; in a particular case, a defendant might well conclude that he is better off with a less experienced, skilled, or careful officer presiding over jury selection, since errors in the process do not necessarily favor the government. For that reason, the defendant should not be permitted to accept jury selection by a magistrate and then later claim that the use of a magistrate for that purpose was an egregious error that led to a gross miscarriage of justice.

4. Respondent's final argument (Br. 39-46) is that it is reversible error for a magistrate to conduct voir dire unless the defendant personally consents to that procedure, which respondent did not do in this case.

Even if respondent were correct that Article III requires that a party must consent in order for a magistrate to conduct a criminal trial, that proposition would not help respondent, since the magistrate did not conduct the trial in this case. The magistrate simply assisted the court by conducting a preliminary proceeding that was subject to a de novo review by the court at her request. This Court's decision in *Raddatz* shows that if de novo review of a magistrate's actions by the district court satisfies Article III, placing on the defendant the burden of requesting such review also does not violate Article III.[13]

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vides no basis for that assertion. Moreover, at the conclusion of jury selection, respondent's counsel expressly declined an invitation to object to the way and jury was selected, J.A. 54, and she did not raise that point before the district court.

[13] Each of the cases cited by respondent holding that consent is necessary involved the magistrate's presiding over the trial or entering a final judgment in the case.

Respondent also characterizes the right to have a district court conduct voir dire as a "personal" and "fundamental constitutional right," Br. 44, 45, that only a defendant herself can waive, but that characterization does not help her case. The right at issue here is not the right to have a trial at all, nor is it the right to have a jury decide the defendant's factual guilt or innocence before an Article III judge; respondent received both. At issue is only a defendant's right to have an Article III judge preside over the selection of the jury. Since the actual decisions that a court makes regarding which members of the venire should serve on the jury can be subject to a procedural forfeiture rule, *Wainwright* v. *Witt*, 469 U.S. 412 (1985) (defendant can forfeit an objection to the exclusion of members of the venire due to their attitudes toward capital punishment), there is no reason to treat this issue in a different manner. See *Taylor* v. *Illinois*, 484 U.S. 400, 417-418 (1988) ("Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has—and must have—full authority to manage the conduct of the trial. The adversary process could not function if every tactical decision required client approval.") (footnote omitted); *Estelle* v. *Williams*, 425 U.S. at 512 ("Under our adversary system, once a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney.").

For the foregoing reasons and those given in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

AUGUST 1990

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 262203 20084